

FILED BY CLERK

JUN 25 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0027-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
SANTIAGO ALBERTO)	the Supreme Court
ALTAMIRANO, SR.,)	
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR20040875, CR20042130, CR20044278 (Consolidated)

Honorable Virginia C. Kelly, Judge

REVIEW GRANTED; RELIEF DENIED

Santiago Alberto Altamirano, Sr.

Hinton, OK
In Propria Persona

V Á S Q U E Z, Judge.

¶1 Petitioner Santiago Altamirano, Sr., challenges the trial court's summary dismissal of a successive petition for post-conviction relief he filed pursuant to Rule 32, Ariz. R. Crim. P. In 2005, Altamirano pleaded guilty in three separate cases to aggravated driving under the influence of an intoxicant (DUI) with a suspended driver's

license. The court determined two of the offenses were repetitive based on his prior DUI convictions, and Altamirano was sentenced to a combination of concurrent and consecutive, presumptive prison terms, two of them enhanced, totaling twenty years.

¶2 In a notice and petition for post-conviction relief filed together in this proceeding, Altamirano argued the trial court had erred when it found one of his convictions was an historical prior felony conviction for the purpose of sentence enhancement. *See* 2003 Ariz. Sess. Laws, ch. 11, § 1 (former A.R.S. § 13-604). Apparently recognizing this issue ordinarily would be considered waived because he failed to raise it in his first petition for post-conviction relief, Altamirano maintained his claim was one of “actual innocence” under Rule 32.1(h) and therefore not subject to preclusion.¹ *See* Ariz. R. Crim. P. 32.2(b) (listing exceptions to preclusion).

¶3 The trial court found Altamirano’s claim precluded and dismissed the proceeding. *See* Ariz. R. Crim. P. 32.2(a)(3) (precluding relief on grounds waived in prior collateral proceeding). As the court noted, notwithstanding Altamirano’s reference to Rule 32.1(h), he had not claimed his actual innocence “of the underlying offense,” as that provision requires, but was “really challenging the enhancement of his sentence based on prior DUI offenses.”

¶4 We find no abuse of discretion in the trial court’s summary denial of post-conviction relief and thus have no basis to disturb that ruling. *See State v. Bennett*, 213

¹Rule 32.1(h) provides a ground for relief when “[t]he defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt, or that the court would not have imposed the death penalty.”

Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006) (summary denial of Rule 32 claim reviewed for abuse of discretion). Accordingly, although we grant review, we deny relief.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge